Supreme Court, U.S.
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No. ——

IN THE

# Supreme Court of the United States

UNITED STATES OF AMERICA, *ex rel.*
MAX STEVENS,
*Petitioners*

v.

EAST ALABAMA HEALTHCARE
AUTHORITY d/b/a EAST ALABAMA MEDICAL CENTER,
and TERRY ANDRUS,
*Respondents*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

(1) Whether a relator under the False Claims Act, 31 U.S.C. § 3729 *et seq*. has a duty to protect the United Sates of America's interest in the proceedings beyond that of his own.

(2) Whether denial of Rule 60(b)(3) relief for misconduct in a False Claims Act proceeding is appropriate under *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 322 U.S. 238 (1944) when a relator was held to have been afforded an opportunity to make "a full and fair presentation of his case" but fails to detect the particular misconduct.

## PARTIES, PARENT COMPANIES, AND SUBSIDIARIES

In compliance with the Supreme Court Rule 14(b), Petitioner represents to this Honorable Court that the parties to this petition are all named in the caption of this case. This document is not being filed by or on behalf of a non-governmental corporation affected by Supreme Court Rule 29.6.

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## REFERENCE TO REPORTS OF OPINION

The unpublished decision of the United States Court of Appeals for the Eleventh Circuit was entered on April 3, 2000 (App. B, 2a) and the order denying rehearing and rehearing *en banc* was entered on July 3, 2000 (App. A, 1a). The decision of the United States District Court for the Middle District of Alabama being reviewed by the Court of Appeals for the Eleventh Circuit was entered on June 4, 1999, but was filed in the office of the Clerk of the Court on June 9, 1999 (App. C, 6a).

## CONCISE STATEMENT OF GROUNDS FOR JURISDICTION

The judgment or order of the United States Court of Appeals for the Eleventh Circuit being reviewed is dated April 3, 2000, and the decision denying rehearing and rehearing *en banc* is dated July 3, 2000.

The statutory provision conferring jurisdiction upon this Court to review the judgement or order in question by Writ of Certiorari is 28 U.S.C. § 1254 (1). Rule 10(c) of the Rules of the Supreme Court of the United States provides for review when a United States court of appeals "has decided an important federal question in a way that conflicts with relevant decisions of this court".

This case concerns a request to revisit, under Rule 60(b)(3) (App. D, 11a) of the Federal Rules of Civil Procedure, a prior order of the United States District Court for the Middle District of Alabama denying relief sought under the False Claims Act, 31 U.S.C. § 3729. (App. E, 13a). The Rule 60(b)(3) motion alleged that the Respondents had committed fraud or engaged in other misconduct by representing that they had filed an appropriate plan of correction of Medicare deficiencies found to exist in their health care facilities, when in fact they had only filed a plan of correction as to state deficiencies, but had not filed an appropriate plan as to federal deficiencies.

The Court of Appeals noted in its opinion affirming the denial of relief that it agreed with the trial court that no "fraud or misconduct by the defendants *prevented Stevens from making a full and fair presentation of his case*". (App. B, 4a), (Emphasis added). The Petitioner notes that the Defendants have drawn attention to the fact that witnesses at the initial trial alluded to the absence of an appropriate plan of correction, and that Plaintiff's counsel should have been diligent to detect the fraud or misconduct at that time.

Presumably, those facts led the trial court and the Court of Appeals to the conclusion that the Plaintiff was not entitled to Rule 60(b)(3) relief since he should have detected the fraud and brought it to the trial court's attention at that time.

The failure of Plaintiff's counsel to timely detect fraud or misconduct has been held by this Court in *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 322 U.S. 238, 246 (1944) not to be dispositive of a challenge of such fraud or misconduct, when it held that "*[s]urely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants*". (Emphasis added).

## STATEMENT OF THE CASE

This case was commenced on March 31, 1995, by the filing of a Complaint pursuant to the False Claims Act, 31 U.S.C. § 3729 (App. E, 13a), and Max Stevens became a relator several months later. (R2-54). The United States of America filed a Statement of Interest as the real party in interest in the case. (App. F, 16a). The Complaint asserted that East Alabama Medical Center ("EAMC") was receiving federal Medicare funds based upon misrepresented facts. The case proceeded to a non-jury trial before the Honorable John H. Moore, II, Judge of the Middle District of Florida, visiting and sitting by designation.

At the conclusion of the Plaintiff's case, the Defendants moved for a judgment on partial findings pursuant to Fed. R. Civ. P. 52(c) (R7-171) and, after delivering findings and conclusions orally (App. G, 22a), the court entered judgment against the Plaintiff on April 14, 1998. (App. H, 27a).

The judgment of the trial court was affirmed by the Court of Appeals for the Eleventh Circuit on January 21, 1999, and a petition for rehearing and rehearing *en banc* was denied by this Court on April 20, 1999. A motion for relief under Rule

60(b) was filed on April 13, 1999, asserting that the Defendants had misled the trial court and the Plaintiff when it represented that it had filed a required "Plan of Correction" regarding federal conditions of participation in the Medicare program. (R9-197). The trial court denied that requested relief on June 9, 1999, imposing sanctions upon the relator and his counsel (App. C, 6a) and the relator appealed from that order.

On April 3, 2000, a panel of this Court affirmed the decision of the trial court as to the Rule 60(b) motion, holding that no "fraud or misconduct by the defendants prevented Stevens from making a full and fair presentation of his case." (App. B, 4a) The jurisdiction of the Court of Appeals was posited upon 28 U.S.C. § 1291. The panel found the Rule 60(b) motion to be frivolous, and awarded double costs against Stevens.

The panel decision also expressed the hope that the Plaintiff-Appellant would not "file further frivolous actions" against the Defendants. This present petition is filed, however, not for the purpose of furthering frivolous litigation, but to ensure that the relator has performed any duty he may have to protect the interest of the United States as the real party in interest in this case. The crux of the misrepresentations alleged to have been made lies in statements as to whether the Defendants had filed an appropriate plan of corrections of federal Medicare deficiencies found to exist in their health care facilities. If they did so, they complied with the requirements of 42 C.F.R. § 488.28(a) (App. I, 29a). If they did not do so, their claims for reimbursement from federal funds were unlawful.

In stating their contentions in the pretrial order, the Defendants asserted that "L&C [The State Licensure and Certification Agency] requested that EAMC provide it with a plan of correction, which EAMC promptly did in early December 1996", and "EAMC has submitted a plan of correction to L&C and has cooperated with the same to

correct any alleged deficiencies." (App. J, 33a). Similar statements were made in the Defendants' Response to Plaintiff's Motion for Partial Summary Judgment (App. K, 37a), and at trial. (App. L, 39a).

After thus asserting that their health care facility had filed a "plan of correction," the Defendants argued that, under 42 C.F.R. § 488.28(a) it "may participate in Medicare if the facility has submitted a plan of correction." (App. J, 33a)

At the trial, Robert Melton, who was an employee at the state office of L&C at the time of trial, testified that the Defendants' facility had not submitted a plan of correction regarding the federal Medicare deficiencies. (App. M, 41a). Another state L&C employee, Jimmie N. Prince, testified that "I do not know of a plan that was submitted for those" federal deficiencies. (App. N, 43a).

## ARGUMENT AND AUTHORITIES

The petition for rehearing and suggestion of rehearing *en banc* was not presented to the Eleventh Circuit within the 21-day period prescribed by local Eleventh Circuit rules 35-2 and 40-2 (App. O, 44a), but it is submitted within the 45-day period prescribed for such petitions in cases where the United States is a party. An issue in the case involves a question of whether any misrepresentation by the Defendants should have been detected by the Plaintiffs. If it is held that such is the case, and that the Plaintiff's failure to properly detect that misrepresentation has jeopardized the case, then the interest of the United States would seemingly require a determination as to whether the failure to do so was legally sufficient to bar Rule 60(b) relief.

The contention of the Plaintiff has been that the Defendants engaged in a significant misrepresentation, while the Defendants contend that the Plaintiff should have detected

that misrepresentation when State L&C employees Melton and Prince testified at the trial. (App. P; 46a-48a).

The Defendants further cite cases from other jurisdictions for the general proposition that denial of a Rule 60(b) motion is not an abuse of discretion where the losing party had access to more accurate information. See *Ojeda-Toro v. Rivera-Mendez*, 853 F.2d 25 (1st Cir 1988); *Parrilla-Lopez v. United States*,841 F.2d 16 (1st Cir. 1988); *Lepore v. Vidockler*, 792 F.2d 272 (1st Cir. 1986); *Good Luck Nursing Home, Inc. v. Harris*, 636 F.2d 572 (D.C. Cir. 1980). (App. P).

On the other hand, the Eleventh Circuit has noted that where misleading conduct causes a difference in a party's approach to a case, prejudice results. *See Harre v. A.H. Robins Company, Inc.*, 750 F.2d 1501 (11th Cir. 1985). [1] See, also, *Rozier v. Ford Motor Company*, 573 F.2d 1332 (5th Cir. 1978) (a party is prejudiced by non-disclosure that makes a difference in the way counsel approaches the case and prepares for trial).

These cases, suggesting varying standards for reviewing Rule 60(b)(3) motions, should be read in the light of the Supreme Court's holding in *Hazel-Atlas Glass Company v. Hartford-Empire Company*, 322 U.S. 238, 246 (1944). Under *Hazel-Atlas*, if an issue involves "great moment to the public," a party's failure to "exercise the highest degree of diligence" cannot be used to excuse an opponent's fraud. The Supreme Court also stated, at 322 U.S. at 246:

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong

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[1] References in the *Harre* decision to the perjury and false testimony of a witness were vacated by the Eleventh Circuit in *Harre v. A.H. Robins Company*, 866 F.2d 1303 (11th Cir. 1989). *Harre* is apparently still, however, a viable indication of the Eleventh Circuit's conception of the issue herein presented.

> against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

It seems indisputable at this stage of our nation's history that health care fraud is an issue that involves "great moment to the public." *See* Alabama Law Review, Vol 51, Number 1, collected articles in a Symposium on "Health Care Fraud: Past, Present, and Future."(1999). If that is true, and if *Hazel-Atlas* is applied to the facts in this case, the relator's failure to diligently detect the misrepresentation should not be used to adversely affect the overriding interests of the government, the public, and the judicial system in this case.

## CONCLUSION

The Court is respectfully asked to review the issue of the relator's obligation to the government in this case, and to determine whether any lack of diligence by the relator's counsel should excuse the misrepresentations injected into this case by the Defendants.

Respectfully submitted,

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